(2)

No. 92-1856

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1992

CITY OF LADUE, *ET AL.*,
Petitioners,

vs.

MARGARET P. GILLEO,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENT, MARGARET P. GILLEO, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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MARGARET P. GILLEO,
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On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

Brief Of Respondent, Margaret P. Gilleo,
In Opposition To Petition For Writ Of Certiorari

STATEMENT OF THE CASE

In order to promote its view of municipal aesthetics, the City of Ladue, Missouri ("Petitioners" or "Ladue") sought to completely prohibit its residents from displaying certain disfavored yard signs on their own property. Among the disfavored yard signs are all signs of a political nature. The First Amendment, however, forbids a municipality from restraining speech in this fashion, as the District Court and Court of Appeals properly recognized in this case. Indeed, we are aware of no federal or state case holding that a governmental entity may prohibit its citizens from placing small

signs on their own property expressing their views on important public issues. This case was properly decided below. It is not a difficult case. There is no basis for granting certiorari.

In early December, 1990, Margaret P. Gilleo ("Respondent" or "Ms. Gilleo") obtained a small sign which expressed her political views regarding the United States' involvement in the Persian Gulf. The sign, which was approximately twenty-four (24) inches by thirty-six (36) inches, read "Say No To War in the Persian Gulf, Call Congress Now." Ms. Gilleo was informed by Ladue officials that the sign was in violation of Ladue City Ordinances, Chapter 35, Articles I and II, *et seq.* ("Old Chapter 35"). Pursuant to Old Chapter 35, Ms. Gilleo petitioned the City Counsel for permission to place her sign in her front yard. Her petition was unanimously denied.

On January 21, 1991, after Respondent had initiated this action and obtained a preliminary injunction preventing the enforcement of Old Chapter 35, the Ladue City Council hurriedly repealed Old Chapter 35 and enacted a new Chapter 35 ("New Chapter 35") in its place. (Ladue App. F, at 35a.)[1]

New Chapter 35 is virtually identical to Old Chapter 35 with regard to the preferential treatment of commercial speech over political, non-commercial speech and a selective valuing of some types of non-commercial speech over others. Like Old Chapter 35, New Chapter 35 contains a general proscription against signs, and then proceeds to except certain types of signs from the general ban. New Chapter 35 permits "For Sale" and "For Rent" signs, municipal signs, subdivision and resident identification signs, road signs, health inspection signs, religious signs and school signs. (New Chapter 35, Ladue App. F, Sections 35-4, 35-7, 35-10). New Chapter 35 also extends exceptions to the general ban to

1. References to "Res. App." are to the Appendix to this Brief. References to "Ladue Pet." and "Ladue App." are to Petitioner's Petition for a Writ of Certiorari and its Appendix respectively.

driveway signs (Sec. 35-4c), signs for not-for-profit organizations (Sec. 35-4f), public transportation signs (Sec. 35-4g) and safety hazard signs (Sec. 35-4j).[2]

Following enactment of New Chapter 35, Ms. Gilleo placed another sign inside the front second story window of her home, which she was informed similarly violated Ladue's New Chapter 35. The second sign was eleven (11) inches by eight and one-half (8 1/2) inches and stated "For Peace in the Gulf." (Res. App. 1) On cross motions for summary judgment the District Court permanently enjoined Ladue from enforcing New Chapter 35 and Ladue appealed.

The United States Court of Appeals for the Eighth Circuit affirmed the District Court's order, holding that "the ordinance favors commercial speech over non-commercial speech, and it favors certain types of non-commercial speech over others." *Gilleo v. City of Ladue*, 986 F.2d 1180, 1182 (8th Cir. 1993) (Ladue App. at 4a) (footnote omitted).[3]

The Court of Appeals also rejected Ladue's claim that its ordinance was constitutional based on the "secondary effects" doctrine enunciated by this Court in *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 47-49, 106 S. Ct. 925, 929-30 (1986). First, the Court of Appeals expressed doubt that the secondary effects doctrine was applicable in this case or in any way diminished the precedential value of *Metromedia, Inc. v. City*

2. The main difference between the new and old ordinances is that the new ordinance contains a highly conclusory and self-serving preamble, obviously intended to try to buttress Ladue's position in this litigation. (Ladue App. F at 35a).

3. The Honorable Thomas M. Reavley, Senior United States Circuit Judge for the Fifth Circuit, sitting by designation, authored the opinion, with Circuit Judge Morris Sheppard Arnold and Senior Circuit Judge Floyd R. Gibson concurring.

of San Diego, 453 U.S. 490, 101 S. Ct. 2882 (1981), as Ladue had argued. Then the Court of Appeals assumed for sake of argument that the doctrine extended to cases involving the prohibition of pure political speech on private property, and still held "the prohibited signs are no more associated with the particular secondary effects than many of the permitted signs under Ladue's ordinance." Ladue App. at 5a-6a. *Accord City of Cincinnati v. Discovery Network, Inc.*, ___ U.S. ___, 113 S. Ct. 1505, 1514 (1993) ("The city has asserted an interest in aesthetics, but Respondent publishers' newsracks are no greater an eyesore than the newsracks permitted...")

Finally, the Eighth Circuit held that Ladue's New Chapter 35, as a content-based restriction, had to survive strict scrutiny and be narrowly tailored. *Gilleo, supra*, 986 F.2d at 1184. Ladue App. at 6a-7a. Thereafter, the Eighth Circuit made short work of New Chapter 35, stating: "We have no trouble concluding that Ladue's ordinance is not the least restrictive alternative. Therefore, we affirm the District Court's holding that Ladue's ordinance is unconstitutional." *Gilleo, supra*, 986 F.2d at 1184. Ladue App. at 7a.

Despite two District Court Orders and one unanimous Court of Appeals opinion, Ladue would like this Court to find what no other court would—a content-neutral ordinance and a compelling state interest that outweighs all First Amendment rights.

REASONS FOR DENYING THE PETITION

I. Ms. Gilleo's Yard Sign Represents Pure Political Speech Entitled To The Utmost Degree Of First Amendment Protection And Ladue's Content-Based Prohibition Is Neither Necessary To Fulfill A Compelling State Interest Nor Narrowly Drawn.

The First Amendment protects the rights of all citizens to express their views, regardless of popularity. It embodies "a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open, and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S. Ct. 710, 721 (1964).

Outdoor signs and posters are a time-honored means of exercising First Amendment free speech rights:

> The outdoor sign or symbol is a venerable medium for expressing political, social and commercial ideas. From the poster or "broadside" to the billboard, outdoor signs have played a prominent role throughout American history rallying support for political and social causes.

Metromedia, supra, 453 U.S. at 501, 101 S. Ct. at 2889 (quoting lower court dissenting opinion of Justice Clark at 610 P.2d 430-31)[4].

Recognizing, however, that free speech is not an absolute, this Court has developed certain permitted "time, place and manner" restrictions on free speech when such restrictions are not related to

[4] The small sign chosen by Ms. Gilleo to articulate her views is clearly "pure speech," the most highly protected mode of free speech under the First Amendment, because it is not combined with conduct.

the content of the speech. Having declared that it cannot live with an unrestricted number of signs, however, Ladue has attempted to limit signs not in a neutral fashion, but rather by picking and choosing among various types, categories and messages of signs, decreeing that some will be allowed and others prohibited.

The fact that New Chapter 35 imposes a blanket prohibition against all political speech, rather than favoring or disfavoring particular viewpoints, does not make the ordinance content neutral. Justice White rejected just such an argument in *Metromedia, supra*:

> The First Amendment's hostility to content based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic.

453 U.S. at 519, 101 S. Ct. at 2898; *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 537, 100 S. Ct. 2326, 2333 (1980).

In Ladue, what determines whether a particular type of sign is prohibited or allowed is not its size, duration of display, point of placement, design, material used in its construction or similar criteria, but its content. Thus, a thirty-six (36) inch by twenty-four (24) inch sign stating "House for Sale by Owner, call XXX-XXXX" is permitted, while virtually identical signs stating "Car for Sale by Owner, call XXX-XXXX" or "For Peace in the Gulf, Call Congress Now" are prohibited. A one foot square sign stating "The Jones Family" is allowed, but a smaller sign in the same location stating "Peace on Earth" is prohibited.[5]

[5] It is interesting to note that Ladue's sign ordinance prohibits the display of flags. New Chapter 35 defines "sign" to include any "illustration" which "publicizes an ... opinion," including "banners" and "pennants." Ladue has gone through gyrations at all judicial levels, desperately but unsuccessfully, attempting to distinguish a flag from a banner or pennant. Ladue now claims that a "banner" is an elongated

As a content-based restriction, the ordinance must be subjected to "exacting scrutiny." *Burson v. Freeman*, ___ U.S. ___, 112 S. Ct. 1846, 1850 (1992). Such a restriction can only be justified if its proponent shows that it "is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Burson, supra*, quoting *Perry Education Association v. Perry Local Educators-Association*, 460 U.S. 37, 45, 103 S. Ct. 948, 955 (1983). "[A] law rarely survives such scrutiny..." *Id.* at 1852.

The alleged compelling state interests put forth by Ladue in an effort to justify New Chapter 35 are "privacy, aesthetics, safety and maintenance of real estate values." Ladue Pet. at 2. Very simply, we know of no case in any U.S. jurisdiction in which such considerations were deemed to be compelling state interests sufficient to warrant the prohibition of pure political speech on a person's own private property. There are, however, a number of cases in which these asserted interests have been deemed insufficient to justify sign bans. *See Baldwin v. Redwood City*, 540 F.2d

rectangle (as opposed to a flag which is a regular rectangle) and a "pennant" is a rectangle tapered to a point. Ladue Pet. at 2, n. 3. These distinctions make no sense. Who can state with any certainty when a rectangle becomes "elongated" and thus violates Ladue's ordinance? Respondent submits that compared to the flag of Switzerland or that of the Vatican City, which are square, the United States flag *is* an elongated rectangle. It is not as elongated, however, as the flags of the countries of Qatar or Bahrain.

Ladue's definition of a "pennant" as a "rectangle tapered to a point" is even more curious. This shape sounds suspiciously like a triangle and presumably Ladue's ordinance might then ban the flag of Nepal which is actually a pentagon that looks like two triangles set on top of each other.

Ladue, it seems, is arguing that what distinguishes between a banned flag or sign and an allowed flag or sign is its shape. Both of Ms. Gilleo's prohibited signs, however, are of a nearly identical shape to that of the American Flag. All of these points serve to illustrate the content-based and indefensible nature of Ladue's ordinance.

1360, 1366 (9th Cir. 1976), *cert. den.* 431 U.S. 913 (1977); *Tauber v. Town of Longmeadow*, 695 F. Supp. 1358, 1361 (D. Mass. 1988); *Matthews v. Town of Needham*, 764 F.2d 58 (1st Cir. 1985). While the interests identified by Ladue may be significant governmental interests, they are not the kind of compelling interests which can justify content-based prohibitions of pure speech.

In addition, even if Petitioners were able to meet the compelling state interest requirement, Ladue's ordinance still would have to satisfy the further requirement that it be "narrowly drawn." *Burson, supra*, 112 S. Ct. at 1851. In other words, Petitioners would need to show that New Chapter 35 is the least drastic means available for achieving its purpose. *Boos v. Barry*, 485 U.S. 312, 108 S. Ct. 1157 (1988). Petitioners cannot meet that test.

Without commenting on the constitutionality of the following possible restrictions, it seems simply a matter of common sense that if Ladue's true intent was to protect against a proliferation of signs, Petitioners could have attempted to restrict political, non-commercial signs in any one of the following ways:

- Petitioners could have attempted to restrict the size of any given sign, as they have done with resident identification signs (6 square feet); driveway signs (12 square feet); health inspection signs (2 square feet); not-for-profit organization signs (16 square feet); and "For Sale" signs (6 square feet). New Chapter 35 at Sec. 35-4.

- Petitioners could have attempted to restrict the number of signs that any one resident could place on his or her property, as they have done with "For Sale" and "For Rent" signs. Sec. 35-10.

- Petitioners could have attempted to restrict the number of signs allowable in any subdivision within the City during a given period of time.

- Petitioners could have attempted to restrict the placement of signs to a certain number of feet back from the road, as they have done with church and school signs. Sec. 35-5.

- Petitioners could have attempted to restrict the amount of time that any particular sign could be displayed before a re-application would be necessary, as they have done with church and school signs. Sec. 35-5.

Petitioners have chosen instead to ban all political non-commercial signs. Such action is not the "least restrictive" means to accomplish Ladue's expressed goals of being protected against a proliferation of an unlimited number of signs.[6]

II. THE SUPREME COURT'S *METROMEDIA V. CITY OF SAN DIEGO* OPINION IS STILL GOOD LAW.

Petitioners argue that the plurality opinion in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 101 S. Ct. 2882 (1981), is not good law and that the Court of Appeals and District Court were mistaken in relying on *Metromedia* to find Ladue's ordinance

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[6] The alleged difference between signs like Ms. Gilleo's, which Petitioners claim will proliferate, and permitted signs which they claim "do not proliferate" (Ladue Pet. at 13), is non-existent. In truth, there is no limit in Ladue to the number of most permitted signs. A resident could place "resident identification" signs all over her house or yard. A resident could erect numerous "driveway signs" of twelve (12) square feet each, as long as the signs announced pot-holes or directed someone to "Beware of Dog" or to "Keep Out." (*See* New Chapter 35, Sec. 35-4). The permitted signs are limited only by the good judgment of Ladue's residents—the same judgment that would prevent a proliferation of political signs.

to be unconstitutional. (Ladue Pet. at 7). Ladue's contention is not well-taken.

The principles which the Court of Appeals and District Court drew from *Metromedia* are that it is constitutionally impermissible to place greater value upon commercial speech than on non-commercial speech and to value the content of certain non-commercial speech over that of other non-commercial speech. The logic of this reasoning is self-evident, and this Court has never overruled the *Metromedia* decision.[7]

Further, the *Metromedia* holding that it is constitutionally impermissible to favor commercial over non-commercial speech is merely an application of the principle, articulated in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 563, 100 S. Ct. 2343, 2350 (1980), that the Constitution "accords a lesser protection to commercial speech than to other constitutionally guaranteed expression." The decision in *Central Hudson Gas* was a majority decision, and the Supreme Court has repeatedly reaffirmed the principle that non-commercial speech is vested with greater constitutional value than commercial speech in subsequent cases. *See Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 109 S. Ct. 3028 (1989); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 102 S. Ct. 2875 (1983); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 98 S. Ct. 1912 (1978).

Accordingly, the principles set forth in *Metromedia*, on which the Court of Appeals and District Court relied, remain good law, should continue to be followed, and are not in need of review.

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[7] Petitioners argue that *Discovery Network* obliterates all *Metromedia* distinctions between the First Amendment protections given commercial versus non-commercial speech. This is simply not true. *Discovery Network, supra*, 113 S. Ct. at 1514, n. 20.

III. THERE IS NO CONFLICT AMONG THE COURTS OF APPEALS ON ANY ISSUE THAT WOULD BE CONTROLLING IN THIS LITIGATION.

Petitioner's laundry list of reasons why this Court should grant its Petition for a Writ of Certiorari includes the statement that there is a conflict among the Circuit Courts on general First Amendment principles that apply to sign ordinances. The cases cited by Petitioners, however, belie their contention. These cases fall into two categories. Some are on all fours with this case, in that the courts struck down restrictions of non-commercial speech on private property, or upheld ordinances providing exceptions for non-commercial speech. *Arlington County Republican Committee v. Arlington County Virginia*, 983 F.2d 587, 595 (4th Cir. 1993); *National Advertising Co. v. Town of Niagara*, 942 F.2d 145, 150 (2nd Cir. 1991); *National Advertising Co. v. City of Orange*, 861 F.2d 246, 248-49 (9th Cir. 1988); *Matthews v. Town of Needham*, 764 F.2d 58, 60 (1st Cir. 1985). The other cases cited by Petitioners address onsite/offsite advertising or commercial speech. *Messer v. City of Douglasville, Georgia*, 975 F.2d 1505 (11th Cir. 1992), *cert. den.* 61 USLW 3773 (May 17, 1993); *Wheeler v. Commissioner of Highways, Commonwealth of Kentucky*, 822 F.2d 586 (6th Cir. 1987), *cert. den.* 484 U.S. 1007 (1988); *Lindsay v. City of San Antonio*, 821 F.2d 1103 (5th Cir. 1987); *Harnish v. Manatee County, Florida*, 783 F.2d 1535 (11th Cir. 1986). There is no conflict pertaining to the issues presented by the present case.

IV. *CITY OF CINCINNATI V. DISCOVERY NETWORK, INC.*, HAS NO BEARING ON THE REASONING OR ANALYSIS OF THIS CASE.

Petitioners attempt to seize upon a recently decided Supreme Court First Amendment case in support of their position. However, that case, *City of Cincinnati v. Discovery Network*, ___ U.S. ___, 113 S. Ct. 1505 (1993), is a very strong case for Respondent. The City of Cincinnati, like Ladue, argued that it was motivated only by its concern to reduce the overall number of newsracks on its

streets, maintain aesthetics and provide safety for its residents, and that its elimination of commercial newsracks was content neutral and a reasonable fit to accomplish its purposes. In the course of striking down the ordinance, this Court commented that the City's argument "attaches more importance to the distinction between commercial and non-commercial speech than our cases warrant and seriously underestimates the value of commercial speech." *Discovery Network, supra*, 113 S. Ct. at 1511. Petitioners have interpreted this comment to mean that the Supreme Court has brought non-commercial speech down to the protection level of commercial speech and have placed the holdings of *Metromedia* and its progeny in jeopardy. This interpretation is not supportable and should be ignored.[8]

In striking down Cincinnati's ordinance as unconstitutional, this Court adopted language that is as applicable to Ladue as it was to Cincinnati:

> Cincinnati has enacted a sweeping ban that bars from its sidewalks, a whole class of constitutionally protected speech... The regulation is not a permissible regulation of commercial speech, for on this record it is clear that the interests that Cincinnati has asserted are unrelated to any distinction between "commercial handbills" and "newspapers." Moreover, because the ban is predicated on the content of the publications distributed by the subject newsracks, it is not a valid time, place or manner restriction on protected speech.

Id. at 1517.

[8] This Court also dispensed with Cincinnati's other claimed interests by stating that with regard to aesthetics and safety, any distinction between commercial and non-commercial newsracks bears no relationship whatsoever to the City's alleged interests. *Id.* at 1514. Here, also, there is no relationship whatsoever between Ladue's asserted interest in avoiding a proliferation of signs and the banning of only certain types of signs depending upon their content.

V. The Court of Appeal's Opinion Does Not Jeopardize The Constitutionality Of The Highway Beautification Act And Was Not Criticized By The United States.

Ladue erroneously states that the Court of Appeals' opinion in this case raises questions about the constitutionality of the Federal Highway Beautification Act of 1965. These arguments are a red herring. The Highway Beautification Act, 23 U.S.C. § 131, clearly states in its title and preamble that its purpose is to "control... outdoor advertising." 23 U.S.C. at § 131(a). Petitioners ignore this express statement of legislative intent. Moreover, the Federal statute is limited to industrial and commercial property, 23 U.S.C. § 131(d), and Ms. Gilleo seeks only to place a small political sign on her front lawn or inside the window of her home.

If this Court has any concerns about the Highway Beautification Act, those concerns can be addressed when a Petition for Certiorari is filed in a case which presents issues directly relating to that Act. This case is not an appropriate vehicle for addressing such issues.

Ladue also argues that in a case pending before the United States Court of Appeals for the Third Circuit, *Rappa v. McNulte*, No. 92-7493 (3rd Cir.), argued January 20, 1993, "The Justice Department sharply criticized the Eighth Circuit's opinion as reflecting the confusion in the lower courts as to the proper First Amendment analysis that should be applied to governmental regulations of signs." (Ladue Pet. at 27).

This interpretation of the Justice Department *Amicus Curiae* filing is misguided and misleading.

The Justice Department's 50-page brief ("DOJ Brf.") contains three references to the present case. Two are merely string citations following a citation to *Metromedia*. The third is in a statement by the DOJ that, in its opinion, offsite advertising is far more

prone to proliferate than onsite advertising and that the Court of Appeals here rejected that argument. *DOJ Brf.* at 36. Actually, contrary to the DOJ's statement, the Court of Appeals below did not address the issue of offsite proliferation because it was not presented in this case. The Court of Appeals merely pointed out that Ladue lacked factual support for its proliferation argument and further criticized New Chapter 35 for placing content-based *and* content-neutral limitations on onsite commercial signs—signs Ladue itself claimed are "naturally limited" and not likely to proliferate. *Gilleo, supra,* 986 F.2d at 1183 n.7.

This case involves only private, residential property with no onsite/offsite issues. The Petitioners refusal to recognize this fact and their contention that Ms. Gilleo's small window sign and similar yard signs "should be classified as offsite signs" (Ladue Pet. at 28 n. 18) is simply absurd.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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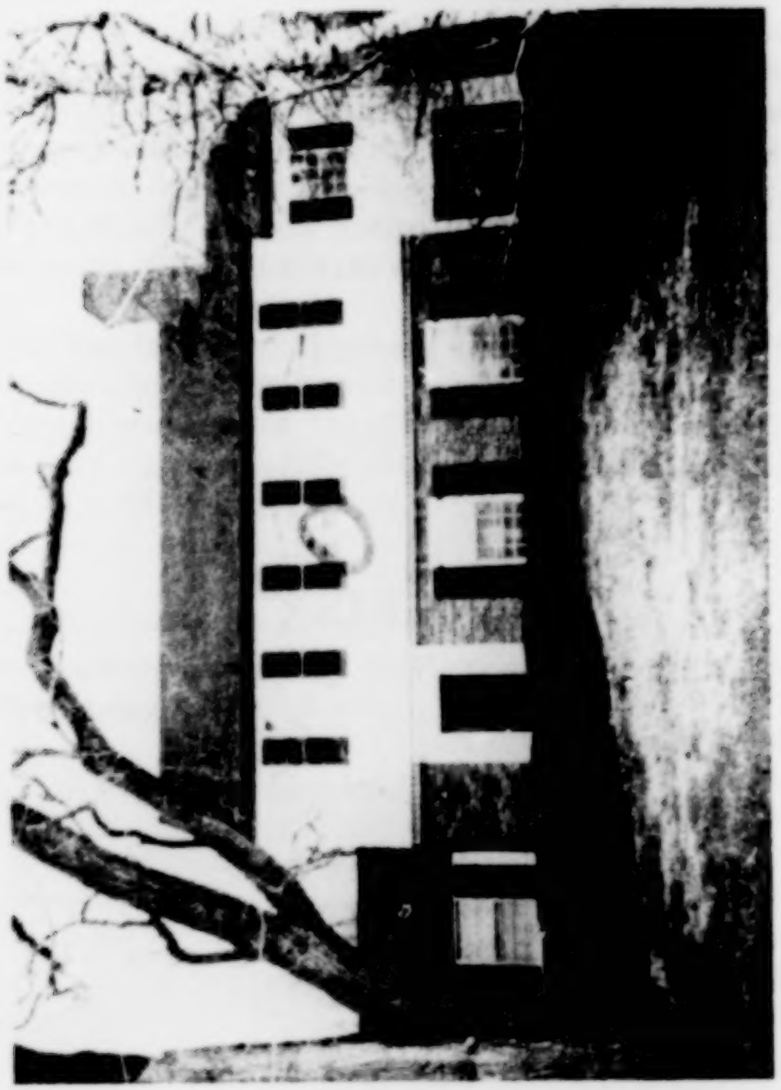
June 21, 1993

APPENDIX



Photograph of Ms. Gilleo's house showing sign (circled) in middle upstairs window.

Close-up photograph of sign reading "For Peace in the Gulf." The display of this sign violated Ladue New Chapter 35.